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NO. 83 - 1790

In the Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Appellant,

VS.

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA,

Appellee.

On Appeal From the Court of Appeal, Second Circuit, State of Louisiana

JURISDICTIONAL STATEMENT

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94 pp

QUESTION PRESENTED

Appellant, Mississippi River Transmission Corporation, a "natural gas company" as that term is defined by the Natural Gas Act (15 U.S.C. §§ 717-171w), owns and operates an interstate natural gas pipeline system by which it transports and sells natural gas in interstate commerce. Appellant owns and operates the East Unionville and the West Unionville Storage Fields (collectively the "Storage Fields"), underground geological formations located in Lincoln Parish, Louisiana, used as a necessary adjunct to its transportation and sale of natural gas. All of the facilities which make up Appellant's pipeline system, including the Storage Fields, were constructed and are operated and maintained pursuant to Certificates of Public Convenience and Necessity issued by the Federal Power Commission, ("FERC"), now the Federal Energy Regulatory Commission, under the Natural Gas Act.

During the 1960s, the demand for natural gas by Appellant's customers grew and continued to increase to the point where the needs of such consumers could not be met solely from the quantities of natural gas which could be contained in Appellant's pipeline system, especially in the winter periods of greatest use. In order to transport and supply the natural gas required on a continuing basis, Appellant developed and placed into operation the Storage Fields as a necessary party of its system in accordance with certificates and orders of the FERC.[1]

In 1977 the volumes of natural gas in transit in

[1] Storage operations commenced in the West Unionville Storage Field in 1969, and in the East Unionville Storage Field in 1973, and have been continuous since commencement.

interstate commerce through Appellant's system, which were temporarily stored in the Storage Fields prior to further transportation under existing contracts for delivery to non-Louisiana consumers, were assessed for ad valorem taxation by the Louisiana Tax Commission, placed on the tax rolls of Lincoln Parish and subjected to ad valorem taxation by the various taxing authorities of the state and parish. Such actions were taken pursuant to the provisions of a state statute, Sub-Title III, Title 47 ("Revenue and Taxation") of the Louisiana Revised Statutes entitled "Provisions Relating to Ad Valorem Taxes" (Louisiana Revised Statutes 47:1702-2332). This action seeks to establish that, as applied to the volumes of Appellant's "working gas" [see discussion, *infra*] temporarily in the Storage Fields, such actions operate as an impermissible regulation or restraint of interstate commerce under the Commerce Clause of the United States Constitution.

The question presented is:

Whether the State of Louisiana and its taxing authorities, consistent with the Commerce Clause of the United States Constitution, may assess, levy and collect ad valorem property taxes on volumes of natural gas in transit in interstate commerce where (a) such gas is temporarily stored within the State of Louisiana in accordance with certificates and orders issued by the FERC pending transportation to other states, and (b) such taxation is possible only because of the fortuitous fact that the geological formations used by Appellant as the storage facilities are located within Louisiana's borders.

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Court of Appeal, Second Circuit, State of Louisiana, are listed in the caption. Section 2403(b) of Title 28 of the United States Code may be applicable to this case. In accordance with Rule 28.4(c) of this Court, this Jurisdictional Statement shall be served upon the Attorney General of the State of Louisiana, William J. Guste, Jr.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Mississippi River Transmission Corporation, filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

MidCon Corp. is the parent of Mississippi River Transmission Corporation.

Mississippi River Transmission Corporation does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

The only affiliates of Mississippi River Transmission Corporation are MCN Transmission, Inc., MCN Exploration Company, MidCon Enterprises, Inc., and Natural Gas Pipeline Company of America.

Dated: May 1, 1984

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MISSISSIPPI RIVER
TRANSMISSION CORPORATION,

Appellant,

VS.

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO
TAX COLLECTOR, LINCOLN PARISH, LOUISIANA,

Appellee.

On Appeal From the Court of Appeal, Second Circuit,
State of Louisiana

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and decree of the Court of Appeal, Second Circuit, State of Louisiana, entered on November 29, 1983, are set out in Appendix "A" to this Jurisdictional Statement, page A-1. The opinion is reported as *Mississippi River Transmission Corporation v. Simonton*, 442 So.2d 764 (La.App. 2nd Cir. 1983).

Appellant timely applied to the Supreme Court of the State of Louisiana for a writ of certiorari or review of that part of the judgment of the Court of Appeal herein appealed. The application was denied by order of the Supreme Court

of the State of Louisiana entered on February 3, 1984. This order is reproduced in Appendix "D", at page A-32.

The opinion of the Third Judicial District Court, Parish of Lincoln, State of Louisiana, in this case is not reported. The original opinion dated March 9, 1983, is set out in Appendix "B", commencing at page A-17, and the judgment of the District Court is set out in Appendix "C", commencing at page A-29.

JURISDICTIONAL BASIS

This is an appeal from that part of a final judgment of the Court of Appeal, Second Circuit, State of Louisiana, holding that a levy under a state tax statute was valid. Throughout the proceedings in the state courts, Appellant drew into question the validity of that statute on the ground of its repugnance to the Constitution of the United States. The judgment of the Court of Appeal was entered November 29, 1983, and by Order entered February 3, 1984, the Supreme Court of the State of Louisiana refused to review the judgment against Appellant.

The judgment of the Louisiana Court of Appeal of which review and reversal of a part are sought is, under the judicial and procedural system of Louisiana, a judgment of the highest court of the State of Louisiana in which a decision in this cause could be had.

The judgment was deemed to have been final on February 3, 1984, when the Supreme Court of the State of Louisiana refused to review it. Notice of appeal was filed by Appellant with the Clerk of the Court of Appeal on April 16, 1984. The Notice of Appeal, showing the date it was

filed and the court where it was filed, is shown in Appendix "E", at page A-33.

The jurisdiction of the United States Supreme Court to review this decision of the Court of Appeal, Second Circuit, State of Louisiana, on appeal is conferred by Title 28, United States Code, Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action raises questions concerning the validity of Sub-Title III of Title 47 of Louisiana Revised Statutes, "Provisions Relating to Ad Valorem Taxes", Louisiana Revised Statutes 47:1702-2332, under and as being repugnant to the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3. The text of these authorities, insofar as is presently pertinent, is set out in Appendix "F", commencing at page A-36.

STATEMENT OF THE CASE

Appellant, Mississippi River Transmission Corporation, is a "natural gas company" as that term is defined by the Natural Gas Act (15 U.S.C. §§717-717w), subject to federal jurisdiction and regulation. It owns and operates an interstate natural gas pipeline system by which it transports and sells natural gas in interstate commerce.

Appellee, Wayne Houck (substituted for the original Defendant), is the Sheriff and Ex-Officio Tax Collector of Lincoln Parish, Louisiana. He is the officer designated by Louisiana law for the collection of ad valorem taxes due on properties located within Lincoln Parish, Louisiana.

This action was brought pursuant to the Louisiana Revised Statutes 47:2110 for the refund of 1977 ad valorem taxes assessed upon volumes of natural gas being transported in interstate commerce and which are temporarily stored in the Storage Fields pending further transportation and delivery in interstate commerce to out-of-state consumers.[2]

Appellant seeks to have determined that ad valorem taxation of the volumes of working gas by the State of Louisiana is invalid under the Commerce Clause of the United States Constitution. While Appellant challenged the taxation of both cushion and working gas before the Louisiana courts, it here challenges the taxation only of its volumes of working gas. This recognizes the fact that cushion gas is intended to be retained in storage fields rather than being cycled in and out on an annual basis as is normally the case with working gas.

The Commerce Clause of the United States Constitution was fashioned to prevent the imposition of taxes which could only be imposed upon goods destined for other states due to the geographic situation of the taxing state. A state statute imposing an ad valorem property tax on goods in transit in interstate commerce contravenes that purpose and is therefore invalid. *E.G., Coe v. Errol,* 116 U.S. 517 (1886); *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929).

The continuity of transit of interstate goods remains unimpaired despite a physical break in their interstate journey where the interruption in the transit of the property is attributable to one of the following circumstances: the

[2] Ad valorem taxes assessed upon Appellant's volumes of natural gas temporarily in storage for the years of 1978, 1979 and 1980 were added to the scope of this suit by orders of the District Court.

exigencies of the chosen means of transportation; consideration of the safety of the goods during transit; or a natural cause over which the owner has no control. *E.g., Minnesota v. Blasius*, 290 U.S. 1 (1933); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366 (1922); *Carson Petroleum Co. v. Vial, supra; Coe v. Errol, supra.*

The Louisiana Court of Appeal, by rejecting the contention of Appellant that the taxation of its natural gas temporarily in storage during interstate transit is prohibited by the Commerce Clause, has approved the ad valorem taxation of property which may only be imposed because of the geographical location of the state.[3]

STATEMENT OF THE CASE

Appellant's storage operations were initiated to meet the growing needs of its existing customers in an orderly and uninterrupted manner in accordance with certificates and orders issued by the FERC. The gas stored in the Storage Fields was committed to these obligations and to consumers in states other than Louisiana. Moreover, these storage operations were not commenced or continued by Appellant because it had surplus, uncommitted natural gas or because of "take or pay" contract problems with producers from whom it purchased natural gas.

The Storage Fields are natural, geological reservoirs selected by Appellant due to their physical characteristics, adaptability to storage facilities and the volume of natural gas they would contain.

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[3] Louisiana is located between the prolific gas producing fields of the State of Texas and of the offshore federal domain and the consuming states served by Appellant.

Natural gas enters Appellant's interstate system at various points in Louisiana and Texas. From the moment the gas enters Appellant's pipelines, it is committed to Appellant's customers in Arkansas, Missouri and Illinois. The system, the natural gas placed therein and the sales therefrom are certificated and subject to regulation by federal agencies, principally the FERC. No sales of the natural gas that is withdrawn from the Storage Fields are made in the State of Louisiana.

"Native", "Cushion" and "Working" gas comprise the categories of natural gas that are in the Storage Fields. "Native" gas consists of natural gas which was not recovered when the fields were producing; "Cushion" gas consists of natural gas injected by Appellant into the Storage Fields to provide the base pressure required for operation; and "Working" gas consists of the volumes of natural gas temporarily stored in the Storage Fields pending its further transportation and delivery to customers. At all times the volumes of cushion and working gas in the Storage Fields are measured and known by Appellant. The native gas presently is not being subjected to ad valorem taxation under the laws of Louisiana.

The normal operations of the storage facilities involve two seasons. The "injection" season is the period of time during which working gas is injected into the formations and occurs primarily during the summer months (April through March of each tax year). The "withdrawal" season is the period of time during which working gas is removed from the reservoirs and occurs primarily during the winter months (January through March and November through December of each tax year) when the demands for the gas are the greatest. While temporarily in the Storage Fields, the gas remains subject to federal certificate and regulatory require-

ments and to the requirements of Appellant's existing contracts which provide for the delivery of the gas to consumers outside of the State of Louisiana. Appellant could not divert the gas in storage to an intrastate market, nor could Appellant hold the gas for sale in expectation of increased profits.

Ad valorem taxes assessed for the year 1977 were calculated by the Louisiana Tax Commission upon the value of the average monthly volumes of cushion and working gas in the reservoirs during 1976, as reported by Appellant. For the subsequent years of 1978, 1979 and 1980, the ad valorem taxes were calculated on the basis of the volumes of such gas in storage as of December 31 of the respective, preceding years.

Appellant timely paid the ad valorem taxes claimed under protest for each of these years and timely filed this action asserting the invalidity of the attempted taxation and seeking refund of the taxes paid, all in accordance with state procedural law.[4]

The total dollar amounts of ad valorem taxes assessed on and attributable to Appellant's gas in storage were $326,562.96 for tax year 1977; $210,246.53 for tax year 1978; $180,444.21 for tax year 1979; and $227,693.98 for tax year 1980.

The total dollar amounts of ad valorem taxes assessed on and attributable to Appellant's working gas were $108,712.81 for the tax year 1977; $54,432.83 for the tax year 1978; $74,054.30 for the tax year 1979; and $86,308.86 for

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[4] See Louisiana Revised Statutes 47:2110 set out in Appendix "F" at page A-41.

the tax year 1980. Of the working gas injected into the Storage Fields, the following amounts were produced from wells located outside of the State of Louisiana or from federal enclaves: 92.85 per cent during the tax year 1977; 89.98 per cent during tax year 1978; 89.84 per cent during tax year 1979; and 82.64 per cent during tax year 1980.

PROCEEDINGS IN AND DECISION OF THE TRIAL COURT

On January 25, 1978, Appellant filed this action in the state district court, as required by the provisions of Louisiana Revised Statutes 47:2110, praying for a refund of ad valorem taxes for the year 1977, paid under protest, attributable to its natural gas inventory in the Storage Fields. In each of the three subsequent years, Appellant paid the ad valorem taxes assessed on its natural gas in storage under protest and had the amounts included within the scope and coverage of this action by orders of the district court. During the pendency of this action, Wayne Houck, the successor to George B. Simonton, as Sheriff of Lincoln Parish, was substituted as the proper party defendant by order of the district court.

Appellant and Appellee entered into stipulations as to the facts of this case, and the deposition of a corporate officer of Appellant was taken by the Appellee. The case was submitted to the trial court for decision on the stipulated facts, the deposition and briefs of the parties.

On March 9, 1983, the district court handed down its decision in this case with written reasons. It rejected Appellant's contentions that the assessment of the ad valorem taxes on its natural gas in storage was repugnant to and impermissible under the Commerce Clause and refused to order the refund of such taxes paid under protest. In so doing, the

trial court relied exclusively on the prior decision of the State Court of Appeal in the case of *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La.App. 2nd Cir. 1980), *writ denied* 396 So.2d 929 (1981),[5] and its finding of an economic benefit to Appellant similar to the one utilized in the prior decision to justify allowance of ad valorem taxation. The basis of the holding ignored the many Commerce Clause decisions of this Court in similar interstate commerce situations cited by Appellant in that court and herein which reach a different finding as to the type of economic benefit to or purpose of the taxpayer necessery to permit the taxation of goods temporarily at rest in interstate commerce.

OPINION OF THE COURT OF APPEAL

Appellant raised the same Commerce Clause contentions and quesitons in its appeal to the Court of Appeal, Second Circuit, State of Louisiana, by its specifications of errors and issues presented as to the decision of the district court.

As did the trial court, the Court of Appeal solely relied upon its prior decision in *United Gas Pipe Line Co. v. Whitman, supra*, in rejecting Appellant's Commerce Clause arguments. After citing language from said case, the Court held:

> "Applying these well settled legal principles to the facts presented, we adhere to our opinion in *United Gas Pipe Line Company v. Whitman, supra*, and hold that because the storage of this gas pending its ultimate withdrawal and delivery to out of state customers is based upon an economic decision of

[5] Opinion of the State Court of Appeal set out in Appendix "G", commencing at page A-44.

> Mississippi necessitated by the character of its business and is an economically expedient method of assuring Mississippi the greatest amount of sales, that the commerce clause of the United States Constitution does not prohibit the taxing of this gas in storage." 442 So.2d at page 770.

Appellant will show herein that this decision is erroneous because it misconstrues the uncontested facts of this case and it fails to follow the prior, controlling decisions of this Court on the federal constitutional question involved in permitting the taxation of Appellant's natural gas.

In its application for writs to the Louisiana Supreme Court to review the decision of the Court of Appeal, Appellant's assignments of error drew into question the repugnance of the taxation under state statute to the United States Constitution as was presented and argued in the Court of Appeal. The application was denied on February 3, 1984.

REASONS FOR GRANTING REVIEW

THE QUESTION PRESENTED IS SUBSTANTIAL

A. The Decision of the Louisiana Court of Appeal Strikes at the Heart of the Commerce Clause.

One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1789, was that the Articles left the individual states free to burden commerce among themselves.[6]

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[6] "Two of the chief weaknesses of the Articles of Confederation were the lack of power in Congress to regulate foreign and interstate commerce, and the presence of power in the states to do so. The almost catastrophic results from this sort of situation were harmful commercial wars and reprisals at home among the states...", P. Hartman, *State Taxation of*

The desire to prevent interstate rivalry and friction has been identified as the primary purpose of the Commerce Clause of the United States Constitution. *See, e.g., Hood & Sons v. DuMond,* 336 U.S. 525, 538-539 (1949); *see also* P. Hartman, *State Taxation of Interstate Commerce* 2-3 (1953). The decision of the Louisiana Court of Appeal, approving the ad valorem taxation of Appellant's property which is the subject of interstate commerce by the taxing authorities of Lincoln Parish and the State of Louisiana, violates that fundamental purpose.

The State of Louisiana, its taxing authorities and its courts have taken the position in this case that the Constitution does not limit the State's power to impose ad valorem taxes on property which has commenced its interstate journey and is temporarily stored in the Fields in Louisiana pending further transportation to out-of-state destinations. This case presents the fundamental question of the State's authority to impose ad valorem taxes upon property in transit in interstate commerce. It calls for a decision by this Court.

What Louisiana here seeks to do is to require consumer citizens of other states to pay additional taxes on the gas stored in the Storage Fields over and above those taxes paid without protest by Appellant which are attributable to its permanent plant facilities in Louisiana and the privilege of conducting business in Louisiana. In applying these taxes to Appellant's property, Louisiana is certainly aware of the fact that Appellant, under federal regulation of the price at which it may sell natural gas, is entitled to pass on to and recover these taxes (if held permissible) from the ultimate consumer of the stored gas. This will be the result of the

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(Footnote 6 continued)
Interstate Commerce 2 (1953), citing, *e.g.*, The Federalist Nos. 7, 11, 22 (Hamilton), No. 42 (Madison)

decision of the Court of Appeal, if allowed to stand, even though the protested taxes are a function of the fortuitous fact that the underground, geological formations utilized by Appellant are located within Louisiana's borders. In effect, these taxes through the years will transfer millions of dollars to Louisiana and Lincoln Parish from the citizens of other states.

The decisions of this Court have long recognized the hazard in the fact that encroachments by a state upon interests outside its borders are not subject to any effective political restraint. *See McCulloch v. Maryland,* 4 Wheat. 316, 428-429 and 435-436 (U.S. 1819); *Helvering v. Gerhardt,* 304 U.S. 405, 412 (1938); *South Carolina State Highway Dep't. v. Barnwell Brothers, Inc.,* 303 U.S. 177, 184 n.2 (1938). Where state taxation is such that it falls upon citizens of other states, it is not subject to the safeguards of our political system which ordinarily can be counted on to prevent abuses as happens where taxation affects interests within the state.[7] This observation is particularly applicable in the instance where those who ultimately bear such a tax cannot participate in the election of the legislative body which imposes the tax, while those who benefit from the tax's imposition elect the state judicial officials who are required in the first instance to determine the validity of the tax under the Commerce Clause.

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[7] Oliver Wendell Holmes, Jr., once noted that while he did "not think the United States would come to an end if we lost our power to declare an Act of Congress void", he did "think the Union would be imperiled if we could not make that declaration as to the laws of the several states". The reason Justice Holmes gave was that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end". Holmes, *The Mind and Faith of Justice Holmes,* 390 (1943).

Appellant initially sought to have this case heard and decided in the United States District Court for the Western District of Louisiana. In its written reasons for dismissing that suit and relegating Appellant to the state court system, the Federal District Court stated that its decision was justified by the fact that "...appeal to the Supreme Court adequately safeguards the plaintiff's federal rights".[8] The United States Court of Appeals for the Fifth Circuit affirmed that determination in the companion *Whitman* case on the authority of *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 331 (5th Cir. 1979). In the *Great Lakes* decision, this Court held that:

> "...it is the court's duty to withhold [federal relief when faced with the initial challenge to the validity of a state's taxes] when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and *secure a review of them by this Court.* This affords an adequate remedy to the taxpayer, and at the same time, leaves undisturbed the state's administration of its taxes." 319 U.S. at page 301 (emphasis added).

Apart from the particular facts of this case, there is little doubt that other states, if this Court fails to review this matter, may seek to exercise their powers of taxation in a

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[8] *Mississippi River Transmission Corporation v. George B. Simonton, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana*, Civil Action No. 78-0087 on the Docket of the U.S. District Court for the Western District of Louisiana, unreported "Memorandum Ruling" in the companion case of *United Gas Pipe Line Company v. Whitman* (No. 78-0086) at page 6 (April 11, 1978), attached as Appendix to and as reasons for Order of Dismissal, dated April 12, 1978. This Order and Memorandum Ruling are set out in Appendix "H", commencing at page A-57.

similar fashion, supported by the belief that judicial review of their local policies by those trained to national views is not available.

B. The Determination of the Louisiana Court of Appeal That The Storage of Natural Gas Was For an Economic and Business Benefit to Appellant Sufficient to Permit The Taxation is Erroneous, is in Direct Conflict With Prior Decisions of This Court, and Narrows Inappropriately the Scope of the Prohibition Against State Taxation of Goods in Transit in Interstate Commerce.

The Commerce Clause prohibits the assessment of nondiscriminatory ad valorem taxes on goods merely in transit through a state. *Minnesota v. Blasius,* 290 U.S. 1 (1933); *Carson Petroleum Co. v. Vial,* 279 U.S. 469 (1929); *Hughes Bros. Timber Co. v. Minnesota,* 272 U.S. 469 (1926); *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366 (1922); *Coe v. Errol,* 116 U.S. 517 (1886). *See also Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976), at page 290, u. 11 and accompanying text. The crucial question in determining whether a state may validly impose such a tax on commodities moving between states but temporarily stored in that state is that of "continuity of transit", a determination based upon all of the particular circumstances characterizing that interruption. *Carson Petroleum Co. v. Vial, supra.*

In this case, the Louisiana Court of Appeal took a restricted view of the circumstances it was to review and concluded that the temporary storage of Appellant's natural gas in Lincoln Parish was for a beneficial business purpose of the owner of sufficient nature to justify the validity of the taxation, relying on its prior decision in *United Gas Pipe Line Co. v. Whitman,* 390 So.2d 913 (La.App. 2nd Cir. 1980), writ denied 396 So.2d 929 (1981).

The Louisiana Court of Appeal had ruled in the prior decision that the immunity from ad valorem taxation afforded property in transit in interstate commerce is lost whenever an interruption of that transit is due to "an intentional detention for the beneficial and business purposes and convenience of the owner" (390 So.2d 913, 916).

In applying only this principle to the facts of this case, the Court of Appeal ignored the decisions of this Court which establish that the occasion for storage is not the only factor to be determined and considered by a court in examining the question of "continuity of transit", and it reached a conclusion conflicting with those decisions. *See, e.g., Carson Petroleum Co. v. Vial, supra; Hughes Bros. Timber Co. v. Minnesota, supra; Champlain Realty v. Town of Brattleboro, supra.* The Court of Appeal, in arriving at its conclusion that "continuity of transit" was interrupted in this case, failed to discuss or apply the governing decisions of this Court which set forth the characteristic and elemental factual circumstances necessary to constitute "a lack of or break in the continuity of transit" sufficient to permit state taxation. *See, e.g., General Oil Co. v. Crain,* 209 U.S. 211 (1908); *Brown v. Houston,* 114 U.S. 622 (1885); *Bacon v. Illinois,* 227 U.S. 504 (1913); *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70 (1947); *Minnesota v. Blasius, supra.*

In *Carson Petroleum Co. v. Vial, supra,* this Court held that the "continuity of transit" of stored oil had not been interrupted and that the application of ad valorem property taxes thereon by the State of Louisiana was invalid, notwithstanding the fact that the taxpayer had stored the oil in Louisiana to take advantage of obvious considerations of business convenience and economy (to save demurrage charges on both railroad tank cars and

ocean-going tankers). In *Champlain Realty Co. v. Town of Brattleboro, supra,* the following factors to be established by an examination of the circumstances characterizing the interruption were identified:[9]

> (a) The original intention of the owner to send the goods to an out-of-state destination;
>
> (b) The control the owner retains to change destination;
>
> (c) The agency by which the transit is effected;
>
> (d) The accomplishment of the intended transportation; and
>
> (e) The occasion or purpose of the interruption.

While it is certain that the purpose of the interruption (i.e., whether the interruption is for the beneficial purpose of the owner) is a relevant factor, the jurisprudence requires that this factor be considered with the others identified above in evaluating whether the "continuity of transit" of the subject property has ended. The Louisiana Court of Appeal erroneously chose to consider only one of the relevant factors in its evaluation, both in its decision in this case and in the *United Gas Pipe Line Co. v. Whitman* case, *supra.*

The characteristic features of the decisions of this Court in which a state has been permitted to tax property which has temporarily come to rest after its interstate journey has begun, determined as a result of the required

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[9] See 260 U.S. at pages 374 through 377.

evaluation of all relevant factors, are that at the time the tax is imposed it cannot be determined what the ultimate destination or use of the property may be and the duration of the cessation of the transportation is indefinite. *See, e.g., General Oil v. Crain, supra; Brown v. Houston, supra; Minnesota v. Blasius, supra; Bacon v. Illinois, supra; Independent Warehouses, Inc. v. Scheele, supra.* Stated in another fashion, these decisions require, for a finding of a taxable interruption in the "continuity of transit", facts present which show that the disposition of the commodity or its further transportation is subject to the will and pleasure of the owner for his profit.

An examination of the particular circumstances surrounding the storage of natural gas in the Storage Fields during the tax years in question establishes the following:

> (a) Appellant injected working gas into the Fields with the intention that these volumes of natural gas be delivered in interstate commerce as part of Appellant's system supply to out-of-state consumers;
>
> (b) Due to federal regulations and existing contracts, Appellant did not have the power to alter the utilization and destination of those volumes of working gas;
>
> (c) The only feasible agency by which the interstate transmission of natural gas can be accomplished is a pipeline system;
>
> (d) The intended transportation and delivery of the volumes of working gas in interstate commerce to the out-of-state consumers was accomplished; and
>
> (e) The purpose of the interruption of the interstate transit of the working gas was to store these

> volumes to enable Appellant to supply the needs of its customers in an orderly and interrupted manner, which otherwise it was unable to do, and to avoid the resultant economic and human injury to its consumers, which would have arisen from its inability to supply their needs.

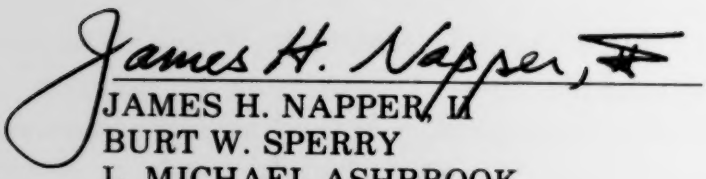
The circumstances of this case establish that Appellant was not operating the Storage Fields as an entrepot for natural gas; nor was Appellant stockpiling natural gas while awaiting an increase in the price therefor. As was the instance with the stored property in the *Carson Petroleum, Hughes Bros.* and *Champlain Realty* decisions, the interruption of the interstate transit of these volumes of working gas was attributable to the exigencies of the chosen (and necessary) means of transportation.

The restrictive approach of the Louisiana Court of Appeal has narrowed inappropriately the scope of the prohibition against state ad valorem taxation of goods in interstate transit established by the Commerce Clause. Appellant respectfully submits that this Court, as the arbiter of the scope of the prohibition of the Commerce Clause, should note probable jurisdiction and correct this error.

CONCLUSION

For each of the foregoing reasons, it is submitted that this matter presents substantial questions concerning the Commerce Clause of which this Court should note probable jurisdiction to review and upon which it should rule.

Respectfully submitted,



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May 1, 1984

CERTIFICATE OF SERVICE

I, JAMES H. NAPPER, II, one of the attorneys for Mississippi River Transmission Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify to service of this Jurisdictional Statement, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, by United States mail, upon each of the following:

Counsel for Appellee:

T. J. Atkins, Esquire
R. W. Farrar, Jr., Esquire
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Attorney General of the State of Louisiana:

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
P.O. Box 44005
Capitol Station
Baton Rouge, Louisiana 70804

Monroe, Louisiana, this 1st day of May, 1984.

James H. Napper II

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APPENDIX "A"

NO. 15,788-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

MISSISSIPPI RIVER TRANSMISSION CORPORATION

Plaintiff-Appellant

versus

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA

Defendant-Appellee

Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Honorable James M. Dozier, Jr., Judge

Counsel for Plaintiff-Appellant
SHOTWELL, BROWN & SPERRY
by: Burt W. Sperry and
James H. Napper, II

Counsel for Defendant-Appellee
BARHAM, ADKINS & TATUM
by: T. J. Adkins and
R. W. Farrar, Jr.

Before FRED JONES, SEXTON and NORRIS, JJ.

NORRIS, Judge

Mississippi River Transmission Corporation appeals from a judgment rejecting its demands for the return of ad valorem taxes paid under protest pursuant to the provisions of La. R.S. 47:2110 to the sheriff and tax collector for Lincoln Parish and denying attorney's fees to the defendant. For the reasons hereinafter discussed, we affirm the judgment in its entirety.

The facts giving rise to this litigation are undisputed and are set forth as follows: On January 25, 1978, Mississippi River Transmission Corporation (hereinafter referred to as "Mississippi") filed a petition pursuant to La. R.S. 47:2110[1] praying for the refund of ad valorem

[1] La. R.S. 47:2110 provides:

A. No Court of this state shall issue any process whatsoever to restrain the collection ot an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recoery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, such amount so segregated shall be further held pending the outcome of the suit. If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the rate of two per centum per annum for the period from the date such funds were received by the officer to the date of such refund.

B. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of

taxes for the tax year 1977 attributable to its natural gas

(Footnote 1 continued)

action in any state or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of such right respecting the legality of any tax accrued or accruing or the method of enforcement thereof. In any such suit, service of process upon the officer designated by law for the collection of the tax shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of actaion at law in the state or federal courts where any tax or the collection thereof is claimed to be an unlawful burden upon interstate commerce, in violation of any act of the Congress of the United States, the Constitution of the United States, or the constitution of the state, or in the federal courts in any case where jurisdiction is vested in any of the courts of the United States. Upon request of a taxpayer and upon proper showing by such taxpayer that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the pending decision of the courts, may pay the additional assessment under protest but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the officer designated by law for the collection of such tax until the question of law involved has been determined by the courts and shall then be disposed of as herein provided.

D. The right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessments or ad valorem taxes paid under protest before the courts of state.

E. Any taxpayer in the state who has paid his taxes under protest as provided in Subsection A above, and who has filed suit under the provisions of R.S. 47:1856, R.S. 47:1857, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit.

inventory stored in its underground storage facilities known as the East Unionville and West Unionville Storage Fields in Lincoln Parish, Louisiana. On December 21, 1978, Mississippi moved and it was ordered that the ad valorem taxes for the tax year 1978 on the stored gas be included in the suit and the amount paid be segregated and held by the tax collector pending the outcome of the suit. On December 27, 1979, the 1979 protested taxes were included within the coverage of this suit on motion of Mississippi and by order of the district court. Likewise, the 1980 taxes were included in this suit by motion and order filed December 31, 1980. By joint motion and order, Wayne Houck, the successor to George B. Simonton as Sheriff of Lincoln Parish, was substituted as the proper party defendant in this action. Mississippi filed an answer and reconventional demand in which it sought attorney's fees.

Mississippi is a "natural gas company" as defined by the Natural Gas Act, 15 U.S.C. 716, et seq., subject to federal jurisdiction and regulation. Mississippi owns and operates an interstate natural gas pipeline system by which it transports and sells natural gas in interstate commerce. As a part of this system, Mississippi owns and operates underground natural gas storage reservoirs located in Lincoln Parish, Louisiana. These reservoirs are known as the East Unionville and the West Unionville Storage Fields (hereinafter collectively referred to as "storage fields").

Mississippi's storage fields and the system to transport gas to and from the storage fields were acquired and constructed and are operated and maintained by Mississippi pursuant to certificates of public convenience and necessity as required by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC") and its

predecessor. All necessary orders and permits were also obtained from the Louisiana Department of Conservation, now known as the Office of Conservation.

Mississippi's storage operations were initiated in order to serve its existing contractual customers in an orderly and uninterrupted fashion. All gas stored in the storage fields is committed to these contractual obligations. Storage operations commenced in the West Unionville Storage Field in 1969 and in the East Unionville Storage Field in 1973. These storage operations have been continuous since they were begun. The storage operations were not commenced or continued by Mississippi because it had surplus, uncommitted natural gas or because of "take or pay" contract problems with producers from whom it purchases natural gas. These storage fields are natural reservoirs selected by Mississippi due to their physical characteristics, adaptability to storage facilities and the volume of natural gas they would contain.

Natural gas enters Mississippi's interstate system at various points in Louisiana and Texas. From the moment the gas enters Mississippi's pipelines, it is committed to its customers in Arkansas, Missouri and Illinois, which it serves pursuant to certificates of public convenience and necessity issued by FERC. The system, the natural gas placed therein and the sales therefrom are certificated and subject to regulation by federal agencies, including principally the FERC. Mississippi makes no sales in the State of Louisiana of the natural gas that is withdrawn from the storage fields.

"Native", "Cushion", and "Working" gas comprise the categories of natural gas that are in the storage fields. Native gas consists of natural gas which was not recovered

when the field was producing. Cushion gas consists of natural gas injected by Mississippi into the storage fields to provide the base pressure required for the operation of the storage fields. Working gas consists of the natural gas stored for varying periods of time in the storage fields pending its further transportation and delivery to customers. At all times, the volumes of cushion and working gas injected into and withdrawn from the storage fields are measured and known by Mississippi. The term "gas in storage" refers to both cushion and working gas.

The normal operation of the storage facilities is in two seasons. The "injection" season occurs generally in the summer months when there are periods of lower demand. The "withdrawal" season generally corresponds with the winter months when demands for natural gas are the greatest. While in the storage fields, the gas in storage remains subject to federal certificate and regulatory requirements and to the requirements of Mississippi's existing contracts which provide for the delivery of gas outside of Louisiana. Mississippi could not divert the gas in storage to an intrastate market nor could Mississippi hold the gas for sale in expectation of increased profits.

Ad valorem taxes for the year 1977 were calculated upon the value of the average monthly volumes of cushion and working gas in the storage fields during 1976, as reported by Mississippi to the Louisiana Tax Commission. Ad valorem taxes for 1978, 1979, and 1980 were calculated on the basis of gas in storage as of December 31st of the preceding year. Mississippi has timely paid the ad valorem taxes under protest for each of these years and has timely filed a petition seeking refund of the taxes paid pursuant to La. R.S. 47:2110. No ad valorem taxes were either due or assessed as to native gas.

The total dollar amounts of ad valorem taxes assessed on and attributable to Mississippi's gas in storage were $326,562.96 for the tax year 1977; $210,246.53 for the tax year 1978; $180,444.21 for the tax year 1979; and $227,693.86 for the tax year 1980. The total dollar amounts of ad valorem taxes assessed on and attributable to Mississippi's cushion gas were $217,850.15 for the tax year 1977; $155,813.70 for the tax year 1978; $106,389.91 for the tax year 1979; and $141,384.87 for the tax year 1980. The amounts attributable to cushion gas account for approximately 66% of the ad valorem taxes collected over the past four years. All of the volume of cushion gas was placed in the storage fields prior to and during the tax year 1977. Of that volume, 79.44% was produced from wells located outside of the state of Louisiana or from Federal Enclaves, and the remaining 20.56% was produced from wells located in the state of Louisiana and outside any Federal Enclave with Louisiana severance taxes having been paid thereon.

The total dollar amounts of ad valorem taxes assessed on and attributable to Mississippi's working gas were $108,712.81 for the tax year 1977; $54,432.83 for the tax year 1978; $74,054.30 for the tax year 1979; and $86,308.86 for the tax year 1980. Of the working gas injected into the storage fields, the following amounts were produced from wells located outside of the state of Louisiana or from Federal Enclaves: 92.85% during the tax year 1977; 89.98% during the tax year 1978; 89.84% during the tax year 1979; and 82.64% during the tax year 1980. The remaining amounts of working gas injected were produced in Louisiana, and Louisiana severance taxes were paid thereon.

This case was submitted for the trial court's decision on stipulations and the deposition of William C. Ade, the

vice-president of supply and gas control with Mississippi. After considering the stipulations and the testimony of Mr. Ade, the trial court found that the storage fields in qustion were for the economic benefit and business purposes of Mississippi and rejected the demands of Mississippi. After finding that this was a suit involving the timely payment of taxes under protest, the demand of Mississippi for attorney's fees was rejected.

Mississippi appeals assigning the following errors:

A. The District Court erred in failing to find that the volumes of cushion and/or working natural gas of the Plaintiff temporarily in storage for the tax years in question were goods in transit in interstate commerce and therefore exempted from state and local ad valorem taxation by the Commerce Clause (Article I, Section 8, Clause 3) and the Supremacy Clause (Article VI, Clause2) of the United States Constitution.

B. The District Court erred in failing to find that the volumes of cushion and/or working natural gas of the Plaintiff temporarily in storage for the tax years in question were goods in transit in interstate commerce and therefore exempted from state and local ad valorem taxation by Article VII, Section 21(D) (3) of the Louisiana Constitution of 1974 and LSA-R.S. 47:1951.3.

C. The District Court erred in failing to find that the volumes of natural gas of the Plaintiff temporarily in storage for the tax years in question, which were purchased from and delivered to storage from sources outside of Louisiana and which were sold and delivered to customers outside of Louisiana, were exempted from state and local ad valorem taxation by Article VII, Section

21(D) (3) of the Louisiana Constitution of 1974 and LSA-R.S. 47:1951.3.

Defendant has answered the appeal seeking an amendment of the trial court judgment to award attorney's fees under La. R.S. 47:1998.

Mississippi argues that the decision of the trial court that the gas in storage for the tax years in question was subject to state and local ad valorem taxation was erroneous because all of the volumes of the gas in storage were goods in transit and were subjects of or inseparably used in interstate commerce and were exempted from ad valorem taxes by the Commerce Clause and the Supremacy Clause of the United States Constitution as well as under Article VII, § 21 (D)(3) of the Louisiana Constitution of 1974 and La. R.S. 47:1953.1 It is further argued that the "continuity of transit" of the interstate journey of the working gas was not interrupted or broken by the temporary storage of the gas for the tax years under the applicable federal jurisprudence and that the gas remained in interstate commerce while temporarily in storage in Lincoln Parish thereby making the taxes levied thereon an impermissible burden on interstate commerce. It is argued that because all of the volumes of cushion and/or working gas were temporarily in storage for the tax years after their having been purchased from and delivered to storage from sources outside of Louisiana and subsequently sold and delivered to customers outside of Louisiana that they were constitutionally exempted from the taxes levied by the prohibition contained in Article VII, § 21 (D)(3) of the Louisiana Constitution of 1974.

An identical argument has been resolved by this court adversely to Mississippi's position in *United Gas*

Pipe Line Company v. Whitman, 390 So.2d 913 (La. App. 2d Cir. 1980). However, Mississippi argues that the instant case is factually distinguishable. In *United*, the gas company operated a storage facility for natural gas in Bienville Parish, Louisiana, in a large underground geological formation which was formerly a producing natural gas field. Large quantities of working gas were piped primarily from out of state to the storage facility pending its ultimate withdrawal and delivery to out of state consumers during the winter season. United was assessed by the local tax collector for ad valorem taxes for the working and cushion gas in storage and thereafter filed suit for the recovery of the taxes it paid pursuant to La. R.S. 47:2110. United contended that the ad valorem taxes assessed on the working gas in storage were prohibited by the Commerce Clause of the United States Constitution because the gas was in transit in interstate commerce. In *United*, we held that the immunity from local taxation was lost because the storage of the working gas pending its ultimate withdrawal and delivery to out of state consumers was based on an economic decision of United necessitated by the character of its business, that is, the storage of the gas pending winter demand was an economically expedient method of assuring United the greatest amount of sales. Mississippi argues that the distinguishing features of the *United* decision are that in *United*, the long term purchase contracts had been entered into with natural gas producers and contained "take or pay" provisions which required that United either take the gas produced or pay for the annual volume of gas available for delivery. During the mid 1960's, United's supply of natural gas exceeded the demand and United elected to build the storage facility to store its excess gas. Although the original purpose of the storage facility was to alleviate "take or pay" problems, this situation did not exist at the time of the suit.

In the instant case, the storage fields were obtained for the purpose of meeting the increasing needs of Mississippi's existing customers in the most effective manner. "Take or pay" problems were and are not an issue. The storage fields were natural gas fields from which production had been taken. Mississippi acquired these storage fields in 1969 and 1973 because their pipeline facilities and suppliers could not provide as much gas as was needed to supply its customers. Other alternative methods of solving this problem were considered by Mississippi's management and the decision was made to acquire the storage fields as the most economically feasible method to operate its pipeline effectively to meet its customers' needs. At the time that the storage fields were acquired, the country was in an "energy crunch"; therefore, Mississippi would have been unable to meet its customers' needs during the peak season without these fields or some other method of storage. These storage fields are an important part of the continuing daily operation of the company. If the company was unable to utilize these fields, it would have a definite impace on its ability to serve its customers' needs and the company's profits. While Mississippi argues that the federal scheme of regulation known as the "Sales Refund Obligation" which requires Mississippi to refund the benefits of any extra sales above annual volume to its resale customers reduces the economic benefits of selling more gas through storage, this regulation is comparatively new and was not a consideration in the determination to utilize the storage fields in Lincoln Parish.

The trial court found that the storage of gas in Lincoln Parish was for an economic purpose and business benefit to Mississippi. This finding is supported by the record; thus, we cannot find that it is clearly wrong. Accordingly, the *United* decision is not factually distinguishable

and the legal principles applied therein are equally applicable here. In *United*, we stated:

> The commerce clause prohibits taxation by the states of property which is in transit in interstate commerce. However, by reason of a break or interruption in the interstate transit, the property may be deemed to have come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax. The crucial question to be settled in determining whether property moving in interstate commerce is subject to local taxation is that of its "continuity of transit." *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626, 629 (1929).
>
> The general rule is that the interstate transit is continuous and the property is not subject to local taxation where the storage or delay is due to transportation, safety, or natural cause reasons. This immunity from local taxation is lost where the interruption is due to an intentional detention for the beneficial and business purposes and convenience of the owner. *Enterprise Products Co. v. Whitman*, 364 So.2d 634 (La. App. 2d Cir. 1978) writ denied 366 So.2d 916 (1979). "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *Independent Warehouses v. Scheele*, 331 U.S. 70, 73, 67 S.Ct. 1062, 1065, 91 L.Ed. 1346, 1353 (1947).
>
> The resolution of the present case requires the application of these well settled legal principles to the facts before us to determine the reason or purpose behind United's decision to place the natural gas in storage in Bienville Parish.

* * *

> We are of the opinion that the storage of the working gas in Bienville Parish pending its ultimate withdrawal and delivery to out of state consumers is based on an economic decision of United necessitated by the character of its business. *** The storage of this gas pending winter demand is an economically expedient method of assuring United the greatest amount of sales. The commerce clause of the United States Constitution does not prohibit the taxing of this gas in storage.

Applying these well settled legal principles to the facts presented, we adhere to our opinion in *United Gas Pipe Line Company v. Whitman, supra,* and hold that because the storage of this gas pending its ultimate withdrawal and delivery to out of state customers is based upon an economic decision of Mississippi necessitated by the character of its business and is an economically expedient method of assuring Mississippi the greatest amount of sales, that the commerce clause of the United States Constitution does not prohibit the taxing of this gas in storage.

Further adhering to this opinion and our earlier opinion in *Enterprise Products Co. v. Whitman,* 364 So.2d 634 (La. App. 2d Cir. 1978), we additionally hold that Louisiana Constitution Article VII, § 21 (D)(3)[2] is essentially a

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[2] Louisiana Constitution Article VII, § 21 (D)(3) provides:

> Section 21. In addition to the homestead exemption provided for in Section 20 of this Article, the following property and no other shall be exempt from ad valorem taxation:
>
> * * *
>
> (D)(3) Goods, commodities, and personal property in public

codification of Federal law as it existed at the time of the enactment of its predecessor provision and exempts goods and commodities stored in transit in interstate commerce which the state would have been prohibited from taxing under existing Federal law. Because the gas in the instant case was stored by Mississippi for its business purposes, it cannot be considered to be in transit in interstate commerce and there is no exemption from taxation under the Louisiana constitutional provision because the applicable exemption relates only to goods or commodities in transit. La. R.S. 47:1951.3[3] is simplay a statutory effectuation of this constitutional provision and compels the same result. See *United Gas Pipe Line Company v. Whitman, supra; Enterprise Products Co. v. Whitman, supra.*

This suit was brought by Mississippi under La. R.S.

(Footnote 2 continued)

or private storage while in transit through this state which are moving in interstate commerce though or over the territory of the state or which are in public or private storage within Louisiana, having been shipped from outside Louisiana for storage in transit to a final destination outside Louisiana, whether such destination was specified when transportation began or afterward.

[3] La. R.S. 47:1951.3 provides:

For the purpose of ad valorem taxation, raw materials, goods, commodities and personal property stored in transit in the state while moving in interstate commerce shall not be treated as incorporated into the mass of the property in this state during the time that such raw materials, goods, commodities or personal property, received from outside the state, are held by any owner in public or private storage to be shipped to a point outside the state of Louisiana, whether specified when transporation begins or afterward.

All such property whether entitled to exemption or not shall be reported to the proper taxing authority on the forms required by law.

47:2110 attacking the legality of the ad valorem taxess levied on the gas in storage in Lincoln Parish and seeking the recovaery of the taxes paid under protest. There is no provision in this statute requiring payment of attorney's fees for the tax collector by the unsuccessful taxpayer. The contention that recovery is allowed under La. R.S. 47:1998[4] is without merit. *United Gas Pipe Line Company*

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[4] La. R.S. 47:1998 provides:

> A. Any taxpayer in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989 shall have the right to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of assessment. Any taxpayer who owns property assessed in more than one parish may institute this suit in either the district court for the parish where the tax commission is domiciled or the district court of any one of the parishes in which the property is located and assessed. Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E).
>
> B. Any taxpayer in the state shall have the right to institute suit in either the district court, for the parish where the tax commission is domiciled or the district court of the parish where the property is located, for the purpose of contesting the correctness or legality of any change in assessment made against thee property under written instructions of the tax commission, pursuant to R.S. 47:1990, which suits must be instituted within thirty days after the date of the written instructions of the tax commission ordering the change. Any taxpayer in the state who has filed suit under these provisions and whose taxes have become due snall pay said taxes under protest and shall cause to issue a notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E).
>
> C. The assessor shall bring suit, when necessary to protect the interest of the state, and shall also ahve the right of appeal and such proceedings shall be without cost to him or the state.

v. Whitman, supra; Enterprise Products Co. v. Whitman, supra.

Accordingly and for the foregoing reasons, the judgment of the trial court is affirmed in its entirety at the cost of appellant.

JUDGMENT AFFIRMED.

(Footnote 4 continued)

D. In all suits relating to property taxes the judge shall hear and try such cases withouut delay, in chambers if necessary, without cost to the reviewers or the assessors.

E. The plea of estoppel shall never be allowed by the court of this state in matters of local or municipal assessments where there are radical defects in the proceedings leading up to such local assessments, but such plea shall have full effect as against mere subsequent irregularities or informalities therein where no protest has been made thereto, provided that nothing contained in this Subsection shall apply to the levying of taxes for the security of any issuance of bonds.

APPENDIX "B"

CIVIL DOCKET NO. 28,347

THIRD JUDICIAL DISTRICT COURT

LINCOLN PARISH, LOUISIANA

MISSISSIPPI RIVER TRANSMISSION CORPORATION

VERSUS

GEORGE B. SIMONTON, SHERIFF and EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA

OPINION

This is an action filed by the plaintiff, MISSISSIPPI RIVER TRANSMISSION CORPORATION, (hereinafter called "Mississippi"), pursuant to the provisions of R.S. 47:2110, in which the plaintiff seeks the refund of ad valorem taxes for the tax year 1977 attributable to its natural gas inventory stored in its underground storage facilities known as the East Unionville and West Unionville Storage Fields, in Lincoln Parish, Louisiana. On the motion of the plaintiff and by Order of the Court, the ad valorem taxes for the tax years of 1978, 1979, and 1980 on the stored gas were also included in this suit.

An Exception of Non-joinder of a Necessary and Indispensable Party was filed by the defendant, but this exception was later dismissed upon defendant's motion. By joint motion and order, Wayne Houck, the successor in office to George B. Simonton as Sheriff of Lincoln Parish, was substituted as the proper defendant in this action.

The defendant answered the petition in the form of a general denial, and alleging the plaintiff's liability for the taxes in question. The defendant also reconvened for attorney fees, and an Answer to the Reconventional Demand was filed by the plaintiff and defendant in reconvention.

The parties entered into stipulations as to the facts of the case, and the deposition of C. William Ade was taken by the defendant. In accordance with the stipulations agreed upon at the hearing, this case was submitted for decisionon the stipulated facts, the deposition and the briefs of counsel.

Mississippi is a "natural gas company," as defined by the Natural Gas Act 15 U.S.C. 716, *et seq.*, subject to Federal Jurisdiction and Regulation. Mississippi owns and operates an Inter-State Natural Pipeline System by which it transports and sells natural gas in Inter-State Commerce. As a part of this system, Mississippi owns and operates underground natural storage reservoirs located in Lincoln Parish, Louisiana. These reservoirs are known as the East Unionville and the West Unionville Storage Fields.

The West Unionville Storage Field, in which operations were commenced in 1969, and the East Unionville Storage Field, in which operations were commenced in 1973, are natural reservoirs selected by the plaintiff due to their physical characteristics, adaptability to storage facilities and the volume of natural gas they would contain. They are operated and maintained by plaintiff in connection with its Interstate Pipeline for the purpose of enabling plaintiff to serve the varying requirements of its contractual customers in an orderly and uninterrupted manner and to conserve natural gas. This means of storing gas during

the periods of lower demand, which is withdrawn during the periods of peak demands, was one selected from a variety of other means by reason of the fact that this was the most economical and to the best interest of the plaintiff. These storage fields are completely independent of the plaintiff's pipeline, as shown by the fact that they require certificates of public convenience and separate approval from the State of Louisiana and the Federal Power Commission.

Gas in storage refers to both cushion and working gas. Working gas consists of the natural gas stored for varying periods of time in the storage fields pending its further transportation and delivery to customers. Cushion gas consists of natural gas injected by Mississippi into the storage fields to provide the base pressure required for the operation of the storage fields. Native gas is another category of gas found in these reservoirs but about which there is no problem in this case.

There appears to be no controversy regarding the volume of gas contended to be contained by the reservoirs during the tax years and the assessment levied thereon.

Plaintif contends that the gas in storage is not subject to an ad valorem tax by the State of Louisiana by reason of the following, to-wit: (a) that such a tax would place a burden upon goods in shipment in Inter-State Commerce in violation of Article I, Section 8, Clause 3, and Article VI, Clause 2, of the United States Constitution; (b) that such a tax would be upon goods, commodities and personal property in public or private storage while in transit through the State of Louisiana while moving in Inter-State Commerce having been shipped from outside Louisiana for storage in transit to a final destination outside of

Louisiana, all in violation of Article VII, Section 21 (D)(3) of the Louisiana Constitution, and R.S. 47:1951.3, *et seq.;* (c) that such would be the levy of an additional tax or license upon oil, gas, or other minerals in violation of Article VII, Section 4 (B) of the Louisiana Constitution.

These contentions appear to have been considered by the Court of Appeal, Second Circuit, State of Louisiana, in the cases of *United Gas Pipeline v. Whitman,* 390 So.2d 913 (Ct.App. 2d Cir., 1980), writ denied, 396 So.2d 929, and *Enterprise Products Company v. Whitman,* 364 So.2d 634 (Ct.App. 2d Cir., 1978), writ denied, 366 So.2d 916. These cited cases appear to have involved the same legal issues and similar factual situations as the instant case.

Article VII, Section 4, (B) of the Louisiana Constitution is intended to prevent the levying of more than one tax upon minerals while they remain underneath the soil. In *United Gas Pipeline Co. v. Whitman,* cited *supra,* Judge Price stated:

> "United contends that since severance tax has already been paid on this natural gas, the ad valorem taxes levied by the defendant-tax collector are in contravention of the above quoted provisions. This argument is without merit. Severance taxes are excise taxes upon the privilege or right to severe natural resources from the soil and are paid by the owner of the resource at the time it is produced. See La. R.S. 47:631, et seq. The prohibition in La. Const. Art. VII, Section 4 (B) against additional taxes is aimed at preventing the natural resource from being taxed while in *place.* If natural resources in the ground could be valued and assessed for property tax purposes, the owner would pay this tax in addition to the severance tax he pays upon producing

> the minerals. The prohibition in Art. VII, §4 (B) is aimed at preventing such multiple taxation. *However once the natural gas upon which severance tax has been paid is purchased by a third party and placed in storage in this State, it becomes subject to an ad valorem property tax the same as any other property.*" (Emphasis added.)

Article VII, Section 21 (D)(3) of the Louisiana Constitution and R.S. 47:1951.3 were argued by the plaintiff in both of the cases cited above. The reasoning of these cases was to the effect that the purpose of the inclusion of this section in the Louisiana Constitution, and the passage in 1960 of R.S. 47:1952.3, was to conform with the Federal Law and to eliminate some confusion that had been created by cases decided in the Louisiana Courts in the past. These two legal provisions are in effect the same as the Commerce Clause of the United States Constitution. In the *Enterprise* case, Judge Hall stated:

> "We agree with the tax collector's contentions and with the decisions of the trial court. The Louisiana Constitution exemption exempts goods and commodities stored in transit in Interstate Commerce which the state stored in transit in Interstate Commerce which the state would have been prohibited from taking under Federal Law as it existed at that time."

There does not appear to be any distinction in the jurisprudence between goods which are shipped into the State and stored and goods which are stored in the State and thereafter shipped outside the State.

The Commerce Clause issue was treated in the

United Gas Pipeline Company case, the following commentary by Judge Price of the Second Circuit, appears applicable to the instant case, at p. 916, to-wit:

> "The commerce clause prohibits taxation by the states of property which is in transit in interstate commerce. However, by reason of a break or interruption in the interstate transit, the property may be deemed to have come to rest within a state and become subject to the power of the state to impose a non discriminatory property tax. The crucial question to be settled in determining whether property moving in interstate commerce is subject to local taxation is that of its 'continuity of transit.' *Carson Petroleum Co. v. Vial,* 279 U.S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626, 629 (1920).
>
> "The general rule is that the interstate transit is continuous and the property is not subject to local taxation where the storage or delay is due to transportation, safety, or natural cause reasons. This immunity from local taxation is lost where the interruption is due to an intentional detention for the beneficial and business purposes and convenience of the owner. *Enterprise Products Co. v. Whitman,* 364 So.2d 634 (La.App. 2d Cir. 1978) writ denied 366 so.2d 916 (La.1979). 'The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied.' *Independence Warehouses v. Scheele,* 331 U.S. 70, 73, 67 S.Ct. 1062, 91 L.Ed. 1346, 1353 (1947).
>
> "The resolution of the present case requires the application of thse well settled legal principles to the facts before us to determine the reason or purpose behind United's decision to place the natural

gas in storage in Bienville Parish.

"Prior to the construction of the Project, United had entered into long term purchase contracts with producers of natural gas. Under the terms of these purchase agreements, United was committed to buy a certain volume of gas during the period covered by the contract. At this time (the early to mid 1960's) the supply of natural gas exceeded the demand and United found itself in a situation where it had no buyers for all of the gas it was committed to buy and insufficient facilities in which to store the excess gas. The alternatives available to United to alleviate this 'take or pay situation' were either to build a storage facility for the gas not immediately marketable or build extensive new pipe line systems to handle the excess. The latter alternative was not feasible economically so United applied to the Federal Power Commission for permission to build the Bistineau Storage Project. As shown by the deposition of Evans H. Lamar, United's general superintendent of gas control, the original purpose of United in utilizing the storage reservoir was to get out of this 'take or pay' situation. By utilizing the storage facilities United was able to purchase gas during periods of lowest demand and transport the gas to the Project where it was stored until the winter months of peak demand.

"*It is apparent that the initial purpose of United in building the Project was to respond to market conditions as they existed at the time, i.e., a purely economic decision made by United to enable it to operate its pipe line system most effectively.* United contends however, that changing market conditions and increased governmental regulation now make the storage of gas in the Project mandatory and beyond its control. At all time applicable to the present case the demand for

> natural gas exceeded the available supply (on a yearly average). This shortage of natural gas nationwide has required the Federal Energy Regulatory Commission to closely regulate the pricing of natural gas and to set curtailment schedules designating priority consumers during times of shortage. State conservation programs also have an effect on the availability of supply during peak demand. United contends that all of these factors in combination require that the gas purchased by it in excess of demand during the summer months be stored so that its priority customers (as set by the curtailment program) will receive their quota of gas during the winter. United therefore contends this governmental regulation of its pipe line system makes the storage of gas in Bienville Parish an 'exigency of the chosen means of transportation,' and therefore the interstate transit of the gas purchased outside Louisiana and stored in transit pending its ultimate delivery to customers outside Louisiana remains continuous. Thus, United argues the break or interruption in the actual movement of the gas does not remove the immunity from state property taxation provided by the commerce clause." (Emphasis added.)

The storage of the gas in question by plaintiff likewise appears to have been done for economic purposes solely, as in the *United Gas Line Company* case.

The plaintiff cites a number of Federal cases in support of its position, but these cases appear to have been based on facts substantially different from those in the instant case. The plaintiff also cites as authority for its position the recent case of *Maryland v. Louisiana*, U.S. (U.S.Sup.Ct., 1981). This case involved the validity of the Louisiana "First-Use" tax, rather than an ad valorem tax,

but was apparently decided on the basis of the "First-Use" tax being discriminatory against Interstate Commmerce. The United States Supreme Court stated in the *Maryland v. Louisiana* case, as follows:

> "Louisiana argues that the taxable 'uses' within the state break the flow of commerce and are wholly local event. *But although the 'Louisiana uses' may possess a sufficient local nexus to support otherwise valid taxation,* we do not agree that the flow of gas from the well head to the consumer, even though 'interrupted' by certain events is anything but a continual flow of gas in interstate commerce." (Emphasis added.)

In a footnote further explanation is given:

> "While the local nexus of certain of the uses is suspect, other uses would appear to have a substantial local nexus so that on the present record it would be difficult to say that the entire tax was unconstitutional on this ground. The act contains a severbility clause providing that if any use is found to be an unconstitutional basis for taxation, the next use would be taxed. See 47 Louisiana Revised Statutes, Section 1303F. Given our resolution on the descrimination charge, *we find it unnecessary to reach the local nexus claim* especially in light of the severibility clause. To this extent, the exception of the United states and the F.E.R.C. is overruled." (Emphasis added.)

The gas in question in the *Maryland v. Louisiana* case was flowing from the wellhead to the consumer. Therefore, the case of *Maryland v. Louisiana,* cited *supra,* does not appear to be pertinent to the issues of this case.

The testimony of Mr. Ade, an employee of the plaintiff, indicates that the storage in the fields in question was for the economic benefit of the plaintiff.

Accordingly, the demands of plaintiff must be rejected.

The remaining issue presented in this case is the question of attorney's fees, claimed by plaintiff in Reconvention under R.S. 47:1998, which allows a compensation of ten percent (10%) on the amount collected, for the attorney representing the tax collector in all proceedings for the reduction of assessments and collection of taxes. In the *Enterprise* and *United Gas Pipeline Company* cases, the Court of Appeal, Second Circuit, denied attorney fees. The tax collector relies upon *South Central Bell Telephone Co. v. Traigle,* 367 So.2d 1143 (S.Ct., 1978) in which attorney fees were allowed the attorney for the tax collector. In the *United Gas Pipeline Co.* case the following language on p. 919 by the Court of Appeal appears to applicable:

> "The plaintiff-taxpayer in the *Bell Telephone* case was seeking recovery of taxes which were already *delinquent* when paid under protest. The taxpayer had failed to timely report and remit the taxes which were due. Also at issue in that case were taxes which had become due after the initiation of the proceeding and which had been *timely reported* and paid under protest. The collector was only awarded as attorney fees 10% of the taxes which were already delinquent when paid under protest. As the majority opinion in *Bell Telephone* seemed to hold that the losing taxpayer was to be assessed 10% of *all* taxes paid under protest, the defendant tax collector sought to have the amount awarded as attorney fees amended to include 10% of the taxes which had

> been timely reported and paid under protest during the pendency of the litigation. This application for rehearing was denied.
>
> "The court has recently faced this issue under circumstances analogous to those presented here. See *Enterprise Products, supra. Enterprise* dealt with ad valorem taxes timely paid under protest pursuant to La.R.S. 47:2110, the same statute at issue in the instant litigation. In response to a reconventional demand for attorney fees pursuant to La.R.S. 47:1998, we held in *Enterprise* that attorney fees should not be imposed against a taxpayer where the tax being contested had been timely paid under La.R.S. 47:2110. We held that §1998 contemplated collection of taxes and penalties not previously paid, and §2110 contemplated litigation over taxes previously paid and on which no penalties were due.
>
> "The taxes assessed and levied on United in this suit were timely paid under protest as were the portion of taxes in the *Bell Telephone* case upon which attorney fees were not awarded."

Thus, the Court of Appeal distinguishes between a suit involving *delinquent* taxes and one involving taxes not yet due. In the instant case, as in the *Enterprise and United Gas Pipeline Co.* case, the taxes were timely paid by December 31 of the year in which they were due, whereas the taxes in question in the *Bell Telephone* case were delinquent. Accordingly, the Reconventional Demand must be rejected.

Formal judgment will be signed in accordance herewith.

Ruston, Louisiana, this 9th day of March, 1983.

/S/Signed
JAMES M. DOZIER, JR., DISTRICT JUDGE,
THIRD JUDICIAL DISTRICT COURT,
LINCOLN PARISH, LOUISIANA

APPENDIX "C"

THIRD JUDICIAL DISTRICT COURT OF LOUISIANA

PARISH OF LINCOLN

CIVIL DOCKET NUMBER 28,347

MISSISSIPPI RIVER TRANSPORTATION CORPORATION

VERSUS

GEORGE B. SIMONTON, SHERIFF and EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA

FILED: April 26, 1983 /S/Signed
Clerk of Court

JUDGMENT

This case was tried on its merits on May 28, 1981. Present: James H. Napper, II, Attorney for Mississippi River Transmission Corporation, plaintiff and defendant in reconvention; and T. J. Adkins and R. W. Farrar, Jr., Attorneys for Wayne Houck, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, defendant and plaintiff in reconvention. After the conclusion of the trial, the court heard the arguments of counsel, the case was taken under advisement, and counsel were ordered to submit briefs.

The court now concluding that the law and the evidence are in favor of the defendant and plaintiff in reconvention on the main demand and in favor of plaintiff

and defendant in reconvention on the reconventional demand, for the reasons assigned in the written opinion of this court filed in the record on March 10, 1983;

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. On the main demand, there be judgment in favor of the defendant, Wayne Houck, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, and against the plaintiff, Mississippi River Transmission Corporation, rejecting the demands of the plaintiff for refund of ad valorum taxes paid under protest in accordance with La. R. S. 47:2110 for the tax years of 1977, 1978, 1979 and 1980, together with all costs; and,

2. On the reconventional demand, there be judgment rendered in facor of plaintiff and defendant in reconvention, Mississippi River Transmission Corporation, and against the defendant and plaintiff in reconvention, Wayne Houck, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, rejecting the latter's demands for attorneys fees claimed under La. R. S. 47:1998.

JUDGMENT READ and signed, in Chambers, at Ruston, Louisiana on this 22nd day of April, 1983.

/S/Signed
DISTRICT JUDGE

APPROVED AS TO FORM:

Mississippi River Transmission Corp.

By: /S/ James H. Napper, II

James H. Napper, II

The Honorable W. Wayne Houck,
Sheriff and Ex-Officio Tax Collector,
Lincoln Parish, Louisiana

By: /S/T. J. Adkins

T. J. Adkins, Esquire

By: /S/R. W. Farrar, Jr.

R. W. Farrar, Jr.

APPENDIX "D"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

No. 83-C-2659

MISSISSIPPI RIVER TRANSMISSION
CORPORATION

VS.

GEORGE B. SIMONTON, SHERIFF AND
EX-OFFICIO TAX COLLECTOR,
LINCOLN PARISH, LOUISIANA

In Re: MISSISSIPPI RIVER TRANSMISSION CORPORATION, applying for Writ of Certiorari or Review, to the Second Circuit Court of Appeal, Number 15,788-CA; Third Judicial District Court, Parish of Lincoln, Number 28,347.

February 3, 1984

Denied.

JLD
PFC
FAB
JCW
HTL

DIXON, C.J., & MARCUS, J., would grant the writ.

APPENDIX "E"

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

NO. 15,788-CA

MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Plaintiff-Appellant,

V.

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA,

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that MISSISSIPPI RIVER TRANSMISSION CORPORATION, the Appellant above named, hereby appeals to the Supreme Court of the United States from that part of the final opinion and decree affirming the judgment holding state and local ad valorem taxation of Appellant's gas in storage valid under the Louisiana Statutes and rejecting Appellant's demands for refund of the taxes paid thereon under protest, entered herein on November 29, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/S/James H. Napper, II

JAMES H. NAPPER, II
BURT W. SPERRY

SHOTWELL, BROWN & SPERRY
708 Ouachita National Bank Bldg.
P.O. Box 1591
Monroe, Louisiana 71210
Telephone: (318) 388-4700

Attorneys for Plaintiff-Appellant,
MISSISSIPPI RIVER
TRANSMISSION CORPORATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing NOTICE OF APPEAL given by Plaintiff-Appellant, Mississippi River Transmission Corporation, has this day been served upon the Defendant-Appellee, Wayne Houck, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, heretofore substituted by Order as party Defendant for the original Defendant, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, by depositing the copy in a United States post office or mailbox, with first-class postage prepaid, addressed to the attorneys of record for the Defendant-Appellee at their post office address, to-wit:

Mr. T. J. Atkins
Mr. R. W. Farrar, Jr.
P. O. Box 777
Ruston, Louisiana 71270

MONROE, LOUISIANA, this 13th day of April, 1984.

/S/James H. Napper, II
JAMES H. NAPPER, II

CERTIFICATE OF FILING

I HEREBY CERTIFY that a copy of the above and foregoing NOTICE OF APPEAL given by Plaintiff-Appellant, Mississippi River Transmission Corporation, has this day been filed with the Third Judicial District Court, Parish of Lincoln, State of Louisiana, as the Court possessed of the record in this action, bearing No. 28,347 on its docket, in accordance with Rule 10.3 of the Rules of the Supreme Court of the United States, by depositing the copy in a United States post office or mailbox, with first-class postage prepaid, addressed to the Clerk of said Court at her mailing address, to-wit:

Honorable Ruby Nell Cobb
Clerk of Court
Third Judicial District Court
Parish of Lincoln
State of Louisiana
Lincoln Parish Courthouse
Ruston, Louisiana 71270

MONROE, LOUISIANA, this 13th day of April, 1984.

/S/James H. Napper, II
JAMES H. NAPPER, II

APPENDIX "F"

LOUISIANA REVISED STATUTES 47:1702-2332

§ 1702. Definitions

As used in this Sub-title, the following terms have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise;

(1) "Property" includes every form, character and kind of property, real, personal, and mixed, tangible and intangible, corporeal and incorporeal, and every share, right, title or interest therein or thereto, and every right, privilege, franchise, patent, copyright, trade-mark, certificate, or other evidence of ownership or interest; bonds, notes, judgments, credits, accounts, or other evidence of indebtedness, and every other thing of value, in possession, on hand, or under the control, at any time during the calendar year for which taxes are levied, within the State of Louisiana, of any person, firm, partnership, association of persons, or corporation, foreign or domestic whether the same be held, possessed, or controlled, as owner, agent, pledgee, mortgagee, or legal representative, or as president, cashier, treasurer, liquidator, assignee, master, superintendent, manager, sequestrator, receiver, trustee, stakeholder, depository, warehouseman, keeper, curator, executor, administrator, legatee, heir, beneficiary, parent, attorney, usufructuary, mandatary, fiduciary, or other capacity, whether the owner be known or unknown; except in the cases of fire, life, or other insurance companies, the notes, judgments, accounts, and credits of nonresident persons, firms, corporations, partnerships, associations, or coompanies doing business

in the State of Louisiana, originating from the business done in this state, are hereby declared to be property with its situs within this state.

(2) "Real estate" or "immovable property" means and includes not only land, city, town and village lots, but all things thereunto pertaining, and all structures and other appurtenances thereto, as pass to the vendee by the conveyance of the land or lot.

(3) "Personal property" or "movable property" means and includes all things other than real estate which have any pecuniary value, all moneys, credits, investments in bonds, stocks, franchises, shares in joint stock companies or otherwise, rights to cut and remove or use standing trees or timber from the land of another whether the time to do so be limited or not, all standing timber or trees owned by any person other than the owner of the land upon which it or they stand, all cases where the ownership of standing trees or timber, or the right to cut and use standing trees or timber is in any person other than the owner of the land upon which the trees or timber stand; the trees or timber or the right to cut and use the same as the case may be shall be assessed to the owner of such right of trees or timber for taxation in the parish where the trees or timber is situated.

(4) "Money" or "moneys" means and includes gold, silver, and other coin, bills of exchange, bank bills or other bills or notes, authorized to be circulated as money, whether in possession or subject to the draft of the depositor or the person having the beneficial interest therein on demand.

(5) "Credit" includes every claim and demand for money, labor, merchandise and other valuable things.

(6) "Person" or "persons", "taxpayer" or "taxpayers" includes firms, companies, associations and corporations; all words importing the masculine gender apply to females also, and all words in the plural number apply to single individuals in all cases in which the spirit and intent of this Chapter require it.

(7) "Actual cash value," or "actual cash valuation," mean the valuation at which any real or personal property is assessed for the purpose of taxation, after the assessing authorities have considered every element of value in arriving at such valuation. The price at which any piece of real estate or personal or movable property shall have been sold for cash in the ordinary course of business, free of all encumbrances, otherwise than at forced sale, shall be evidentiary only, and be considered with other factors in determining the actual cash value for assessment purposes.

(8) "Rolling stock" includes any kind of locomotive, car, or sleeping car used either for freight or passenger purposes, that may be operated ovear any railroad within this state.

§ 1853. Appraisal of public service properties

A. In accordance with the provisions of this Section and Sections 1854 and 1855, the Louisiana Tax Commission shall, on or before September first of each calendar year, appraise, for taxation, public service properties based upon each company's report, as defined in Section 1852(A) and such other information as may be available to the Louisiana Tax Commission. In the absence of a report the Louisiana Tax Commission shall appraise the properties of any company failing to file such a report upon any information which the Louisiana Tax Commission, in its best judgment, deems sufficient.

B. In appraising public service properties, the Louisiana tax Commission shall employ all of the following nationally recognized techniques of appraisal, where applicable, to best determine fair market value: the market approach, the cost approach, and/or the income approach. However, all public service properties of the same nature and kind shall be appraised in the same manner. The appraised value of all lands owned by the company in this state shall be deducted from the total appraised value of the public service properties and shall be assessed by the Louisiana Tax Commission and shown as a separate item on the tax roll.

C. All taxable immovable, major movable, and other movable public service properties of a company that is nonoperating or nonutility shall be appraised and assessed by the local tax assessor in the same manner and by the same standards as similar property in the parish in which it is located.

D. In no event, however, shall the Louisiana Tax Commission adopt schedules that reflect average life values of the property instead of appraising the individual companies.

E. The appraisal for the first year only shall be accomplished by the Louisiana Tax Commnission through the use of an independent appraisal firm or firms qualified in the appraisal of public service properties.

§ 1951. Property subject to ad valorem taxation

All property situated within the state, except as is expressly exempted from taxation by law, shall be subject to taxation on the basis of the assessed valuation thereof.

Property, not otherwise exempt from taxation, of all nonresident persons, firms, corporations, partnerships, associations, or companies is hereby declared subject to assessment and taxation, in the same manner as all other property in the state.

Notes, judgments, accounts, and credits of nonresident persons, firms, corporations, partnerships, associations, or companies doing business in the state, originating from the business done in this state, are property with its situs within this state; providded this paragraph shall not affect the levying, assessing, and collecting of taxes upon fire, life, or other insurance companies.

§ 1951.3. Property stored in transit while moving in interstate commerce

For the purpose of ad valorem taxation, raw materials, goods, commodities and personal property stored in transit in the state while moving in interstate commerce shall not be treated as incorporated into the mass of the property in this state during the time that such raw materials, goods, commodities or personal property, received from outside the state, are held by any owner in public or private storage to be shipped to a point outside the state of Louisiana, whether specified when transporation begins or afterward.

All such property whether entitled to exemption or not shall be reported to the proper taxing authority on the forms required by law.

§ 2051 Tax collectors designated

The sheriffs of the several parishes of the state, the parish of Orleans excepted, shall be ex-officio collectors of state and parish taxes. There shall be

one state tax collector for the city of New Orleans who shall be elected, at the time provided for the election of parochial officials, for the term of four years.

The tax collectors shall be the collectors of all parish and district taxes and shall have the same power to enforce the collection of parish taxes as to enforce the collection of state taxes.

The office of each tax collector shall be at the seat of the parish government; provided that the tax collector for the parish of Jefferson may maintain on the east banks of the Mississippi River, in said parish, an office for the collection of taxes, the expenses of maintaining said office to be paid by the parish of Jefferson.

§ 2110. Suits to recover taxes paid under protest

A. No Court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recoery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, such amount so segregated shall be further held pending the outcome of the suit. If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the rate of two per

centum per annum for the period from the date such funds were received by the officer to the date of such refund.

B. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of such right respecting the legality of any tax accrued or accruing or the method of enforcement thereof. In any such suit, service of process upon the officer designated by law for the collection of the tax shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of actaion at law in the state or federal courts where any tax or the collection thereof is claimed to be an unlawful burden upon interstate commerce, in violation of any act of the Congress of the United States, the Constitution of the United States, or the constitution of the state, or in the federal courts in any case where jurisdiction is vested in any of the courts of the United States. Upon request of a taxpayer and upon proper showing by such taxpayer that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the pending decision of the courts, may pay the additional assessment under protest but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the officer designated by law for the collection of such tax until the question of law involved has been determined by the

courts and shall then be disposed of as herein provided.

D. The right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessments or ad valorem taxes paid under protest before the courts of state.

E. Any taxpayer in the state who has paid his taxes under protest as provided in Subsection A above, and who has filed suit under the provisions of R.S. 47:1856, R.S. 47:1857, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit.

APPENDIX "G"

UNITED GAS PIPE LINE COMPANY,

Plaintiff-Appellant,

v.

Arvis E. WHITMAN, Sheriff and Ex-Officio Tax Collector, Bienville Parish, Louisiana

Defendant-Appellee,

two cases
Nos. 14284, 14285

Court of Appeal of Louisiana,
Second Circuit.

Oct. 28, 1980.

En Banc. Rehearing Denied Dec. 8, 1980.

Before PRICE, MARVIN and JASPER E. JONEs, Jr., JJ.

PRICE, Judge.

Plaintiff, United Gas Pipe Line Company (United), appeals from a judgment of the district court which rejected its demands for the return of ad valorem taxes paid under protest to the sheriff and tax collector for Bienville Parish. The judgment also ordered United to pay defendant's attorney fees. For the reasons discussed below we affirm the judgment rejecting the demand for recovery of the taxes and reverse the judgment ordering plaintiff to pay attorney fees.

In connection with its operation of an interstate natural gas pipe line, Untied owns and operates an underground storage facility for natural gas in Bienville Parish, Louisiana, known as the Bistineau Storage Project (hereinafter referred to as the Project). The Project and the pipe line system are operated pursuant to certificates of public convenience and necessity issued by the Federal Power Commission, now succeeded by the Federal Energy Regulatory Commission (FERC). The Project includes a large underground geological formation which was formerly a producing natural gas field. After most of the recoverable gas had been produced from the field, United began converting it into a storage reservoir in 1966.

There are three categories of natural gas present in the reservoir. "Native" gas is that which was not recovered when the gas field was producing. The volume of native gas present in the reservoir is a constant and is not at issue in this case. The second category consists of gas which is injected into the reservoir to establish the base pressure required for the Project's operation. This is referred to as "cushion" gas. A final category is the "working" gas or the gas which is stored for varying periods of time in the reservoir pending its further transportation and delivery to customers. The term "gas in storage" refers collectively to the cushion and working gas.

The Project's operation is divided into cyclical periods of "seasons." Working gas is purchased from producers in the field and transported via United's pipe line into the reservoir during the "injection" season of April through October of each calendar year. The gas is stored at the Project until the "withdrawal season" (consisting of the months of January through March and November through December) when it is withdrawn and transported

to United's customers. The protested taxes at issue were based on the assessed value of the gas in storage present in the reservoir during tax years 1977 and 1978.

In September of 1977 United received tax notices from the defendant-tax collector for ad valorem taxes based on the assessed value of both the fixed assets and the gas in storage belonging to United in Bienville Parish. Uniteed paid the taxes but protested the amount attributable to the gas in storage and gave written notice of its intention to file suit for the recovery of the protested taxes pursuant to La.R.S. 47:2110. In January of 1978 United filed suit for the recovery of the protested 1977 taxes. In September of 1978 United received tax notices from defendant for ad valorem taxes based on the value of its property in Bienville Parish. Again a portion of these taxes was based on the assessed value of the gas in storage at the Project. This portion of the 1978 ad valorem taxes was paid under protest and suit for recovery was filed in January of 1979. The total amount of ad valorem taxes assessed on and attributable to United's gas stored at the Project was $294,488.45 for tax year 1977, and $412,106.49 for tax year 1978. By joint motion of the parties, recovery of both years' protested taxes based on the assessed value of the gas in storage is included within the scope of this litigation.

United contends that the imposition of ad valorem taxes on the gas in storage violates the commerce clause of the United States Constitution and Article VII § 21(D)(3) of the Louisiana Constitution. United further contends that Louisiana severance tax has already been paid on a portion of the gas in storage which was produced in Louisiana, and that this gas is thus exempt from further taxation under La.Const. Art. VII § 4(B).

The issues on appeal are:

(1) Whether the ad valorem taxes assessed on United's gas in storage at the Project in Bienville Parish are prohibited by the commerce clause;

(2) Whether United's gas in storage is exempt from ad valorem taxation under La.Const. Art. VII § 21(D)(3);

(3) Whether the gas in storage upon which Louisiana severance tax has been paid is exempt from ad valorem taxation under La.Const. Art. VII § 4(B); and

(4) Whether a taxpayer who pays ad valorem taxes under protest and unsuccessfully seeks recovery under La.R.S. 47:2110 is liable for attorney fees of 10% of the amount of taxes paid as provided by La.R.S. 47:1998.

COMMERCIAL CLAUSE

United contends that the ad valorem taxes assessed on the working gas stored at the Project are prohibited by the Federal Constitution, Article I, § 8 as this gas is in transit in interstate commerce. Approximately 97% of the working gas injected into the Project in 1976 and 100% of the working gas injected during 1977 was produced outside of Louisiana and transported by pipe line to the Project for storage pending its ultimate withdrawal and delivery to out-of-state consumers.

The commerce clause prohibits taxation by the states of property which is in transit in interstate commerce. However, by reason of a break or interruption in the interstate transit, the property may be deemed to have

come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax. The crucial question to be settled in determining whether property moving in interstate commerce is subject to local taxation is that of its "continuity of transit." *Carson Petroleum Co. v. Vial,* 279 U.S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626, 629 (1929).

The general rule is that the interstate transit is continuous and the property is not subject to local taxation where the storage or delay is due to transportation, safety, or natural cause reasons. This immunity from local taxation is lost where the interruption is due to an intentional detention for the beneficial and business purposes and convenience of the owner. *Enterprise Products Co. v. Whitman,* 364 So.2d 634 (La.App. 2d Cir. 1978) writ denied 366 So.2d 916 (La.1979). "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *Independent Warehouses v. Scheele,* 331 U.S. 70, 73, 67 S.Ct. 1062, 1065, 91 L.Ed. 1346, 1353 (1947).

The resolution of the present case requires the application of these well settled legal principles to the facts before us to determine the reason or purpose behind United's decision to place the natural gas in storage in Bienville Parish.

Prior to the construction of the Project, United had entered into long term purchase contracts with producers of natural gas. Under the terms of these purchase agreements, United was committed to buy a certain volume of gas during the period covered by the contract. At this time (the early to mid 1960's) the supply of natural

gas exceeded the demand and United found itself in a situation where it had no buyers for all of the gas it was committed to buy and insufficient facilities in which to store the excess gas. The alternatives available to United to alleviate this "take or pay situation" were either to build a storage facility for the gas not immediately marketable or build extensive new pipe line systems to handle the excess. The latter alternative was not feasible economically so United applied to the Federal Power Commission for permission to build the Bistineau Storage Project. As shown by the deposition of Evans H. Lamar, United's general superintendent of gas control, the original purpose of United in utilizing the storage reservoir was to get out of this "take or pay" situation. By utilizing the storage facilities United was able to purchase gas during periods of lowest demand and transport the gas to the Project where it was stored until the winter months of peak demand.

It is apparent that the initial purpose of United in building the Project was to respond to market conditions as they existed at the time, i.e., a purely economic decision made by United to enable it to operate its pipe line system most efffectively. United contends however, that changing market conditions and increased governmental regulation now make the storage of gas in the Project mandatory and beyond its control. At all times applicable to the present case the demand for natural gas exceeded the available supply (on a yearly average). This shortage of natural gas nationwide has required the Federal Energy Regulatory Commission to closely regulate the pricing of natural gas and to set curtailment schedules designating priority consumers during times of shortage. State conservation programs also have an effect on the availability of supply during peak demand. United contends that all of these factors in combination require that the gas purchased by it in

excess of demand during the summer months be stored so that its priority customers (as set by the curtailment program) will receive their quota of gas during the winter. United therefore contends this governmental regulation of its pipe line system makes the storage of gas in Bienville parish an "exigency of the chosen means of transportation," and therefore the interstate transit of the gas purchased outside Louisiana and stored in transit pending its ultimate delivaery to customers outside Louisiana remains continuous. Thus, United argues the break or interruption in the actual movement of the gas does not remove the immunity from state property taxation provided by the commerce clause.

We are of the opinion that the storage of the working gas in Bienville Parish pending its ultimate withdrawal and delivery to out of state consumers is based on an economic decision of United necessitated by the character of its business. United was not required by any governmental agency to construct the Project. The curtailment program of the FERC designates priority consumers among which United must *allocate* available supplies of natural gas. As pointed out by the defendant-tax collector, there is no government requirement that United locate more gas if it is unable to meet the demands of these priority customers. The FERC curtailment program is not designed to regulate the *movement* of the gas in interstate commerce, but rather to allocate the available gas to certain priority consumers. United continues to operate the Project as it did at the inception of its operation, i.e., it purchases gas during periods of slack demand and stores it until the demand is higher and the market will absorb the gas. The storage of this gas pending winter demand is an economically expedient method of assuring United the greatest amount of sales. The commerce clause of the United States Constitution

does not prohibit the taxing of this gas in storage.

LOUISIANA EXEMPTION FOR PROPERTY IN TRANSIT

United contends that La.Const. Art. VII, § 21(D)(3) provides an exemption from ad valorem taxation to the working gas in this case even if it would enjoy no such immunity under the commerce clause of the Federal Constitution. This Louisiana Constitutional provision exempts from taxation:

> Goods, commodities, and personal property in public or private storage while in transit through this state which are moving in interstate commerce through or over the territory of the state or which are in public or private storage within Louisiana, having been shipped from outside Louisiana for storage in transit to a final destination outside Louisiana, whether such destination was specified when transportation began or afterward.

(This constitutional provision is effectuated by its statutory counterpart, La.R.S. 47:1951.3.) According to United's interpretation of this section, it provides two distinct exemptions: (1) the first applicable to property in transit in interstate commerce, and (2) the second applicable to property shipped from outside Louisiana, stored in public and private facilities with a final destination outside Louisiana. United contends that this "second exemption" does not require that the property be in transit in interstate commerce. This identical argument was made by the plaintiff-taxpayer in *Enterprise Products Co. v. Whitman, supra,* and was rejected by this court. We adhere to our opinion in *Enterprise* that Art. VII, § 21(D)(3) is

essentially a codification of federal law as it existed at the time of the enactment of the predecessor provision to Art. VII, § 21(D)(3), and for the reasons previously discussed, the working gas at issue here is not exempt under this Louisiana provision.

LOUISIANA SEVERANCE TAX

The gas stored in the Project upon which the ad valorem taxes at issue were levied consisted of a small percentage of gas which had been produced in Louisiana and upon which Louisiana severance tax had been paid (2.67% of the working gas during tax year 1977, and 19.75% of the cushion gas for both years at issue). The constitutional provision which authorizes the Louisiana Legislature to levy taxes on natural resources severed from the soil or water is La.Const. Art. VII, §4(B) which reads in part as follows:

> (B) Severance Tax. Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance. Natural resources may be classified for the purpose of taxation. Such taxes may be predicated upon either the quantity or value of the products at the time and place of severance. *No further or additional tax or license shall be levied or imposed upon oil, gas, or sulphur leases or rights. No additional value shall be added to the assessment of land by reason of the presence of oil, gas, or sulphur therein or their production therefrom...*[emphasis added]

United contends that since severance tax has already been paid on this natural gas, the ad valorem taxes levied by the defendant-tax collector are in contravention of the above

quoted provision. This argument is without merit. Severance taxes are excise taxes upon the privilege or right to sever natural resources from the soil and are paid by the owner of the resource at the time it is produced. See La.R.S. 47:631, et seq. The prohibition in La.Const. Art. VII, § 4(B) against additional taxes is aimed at preventing the natural resource from being taxed while *in place.* If natural resources in the ground could be valued and assessed for property tax purposes, the owner would pay this tax in addition to the severance tax he pays upon producing the minerals. The prohibition in Art. VII, § 4(B) is aimed at preventing such multiple taxation. However, once the natural gas upon which severance tax has been paid is purchased by a third party and placed in storage in this state, it becomes subject to ad valorem property tax the same as any other property.

ATTORNEY FEES

These suits were brought by United under La.R.S. 47:2110 attacking the legality of the ad valorem taxes on the gas in storage in Bienville Parish and seeking recovery of the taxes paid under protest. There is no provision in this statute requiring payment of attorney fees for the tax collector by the unsuccessful taxpayer. The defendant-tax collector contends he is entitled to recover his attorney fees under La.R.S. 47:1998, the statute prescribing a procedure for judicial review of assessments. Section 1998 provides that the attorney who represents the tax collector in all proceedings for the reduction of assessments and collection of taxes shall receive a compensation of 10% of the amount collected. United contends that this is not a suit challenging the correctness of an assessment nor one for the collection of taxes, but rather a proceeding brought by a taxpayer who has timely paid his taxes and now seeks by the

machinery provided by law to challenge the validity of the tax. The trial court was of the opinion that a losing taxpayer in a paymnent under protest suit such as this must pay the attorney fees in light of the Supreme Court's decision in *South Central Bell Telephone Co. v. Traigle*, 367 So.2d 1143 (La.1978), rehearing denied 1979. The *Bell Telephone* case was concerned with a suit for the recovery of transportation and communication utilities taxes paid under protest pursuant to La.R.S. 47:1576. The taxpayer in *Bell Telephone* lost the suit, and in response to its argument that attorney fees were not awardable in the payment under protest suit, the Supreme Court held that in effect this was a suit for the collection of taxes. Since the monies paid under protest are held in escrow and the state is deprived of the use of this money, the Supreme Court concluded that the *collection* of the taxes waas not complete until a final judgment denying the taxpayer's prayer for the return of taxes paid under protest.

The plaintiff-taxpayer in the *Bell Telephone* case was seeking recovery of taxes which were already *delinquent* when paid under protest. The taxpayer had failed to timely report and remit the taxes which were due. Also at issue in that case were taxes which had become due after the initiation of the proceeding and which had been *timely reported* and paid under protest. The collector was only awarded as attorney fees 10% of the taxes which were already delinquent when paid under protest. As the majority opinion in *Bell Telephone* seemed to hold that the losing taxpayer was to be assessed 10% of *all* taxes paid under protest, the defendant tax collector sought to have the amount awarded as attorney fees amended to include 10% of the taxes which had been timely reported and paid under protest during the pendency of the litigation. This application for rehearing was denied.

This court has recently faced this issue under circumstances analogous to those presented here. See *Enterprise Products, supra. Enterprise* dealt with ad valorem taxes timely paid under protest pursuant to La.R.S. 47:2110, the same statute at issue in the instant litigation. In response to a reconventional demand for attorney fees pursuant to La.R.S. 47:1998, we held in *Enterprise* that attorney fees should not be imposed against a taxpayer where the tax being contested had been timely paid under La.R.S. 47:2110. We held that § 1998 contemplated collection of taxes and penalties not previously paid, and § 2110 contemplated litigation over taxes previously paid and on which no penalties were due.

The taxes assessed and levied on United in this suit were timely paid under protest as were the portion of taxes in the *Bell Telephone* case upon which attorney fees were not awarded. Justice Dennis pointed out in his concurring opinion on the denial of rehearing in *Bell Telephone* that there is a distinction between taxes which are *delinquent* when paid under protest and those which are *timely paid* under protest. It is reasonable for a taxpayer who delinquently pays taxes under protest to be assesed attorney fees as a penalty in the event his challenge is found invalid. On the other hand, a taxpayer who timely pays his taxes and then seeks recovery should not be assessed for the tax collector's attorney fees simply because he is the losing party. Such a rule would place an unreasonable penalty on a taxpayer's right to challenge the validity of a tax and is less than the complete and adequate remedy mandated by La. Const. Art. VII, § 3.[1] Therefore we feel that the award

[1] Section 3. The legislature shall prohibit the issuance of process to restrain the collection of any tax. It shall provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer.

of attorney fees in this case is not appropriate.

For the foregoing reasons, the judgment awarding defendant attorney fees of 10% of the amount of taxes paid under protest is reversed, and his demands in reconvention against United are denied; the judgment rejecting United's demands for recovery of ad valorem taxes paid under protest for the years of 1977 and 1978 is affirmed at appellant's cost.

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 78-0087

MISSISSIPPI RIVER TRANSMISSION CORPORATION

versus

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA

ORDER OF DISMISSAL

For the reasons assigned in the Ruling rendered in Civil Action No. 78-0086 and attached as an Appendix to this Order,

IT IS ORDERED that Civil Action No. 78-0087 be dismissed at plaintiff's costs.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 12th day of April, 1978.

/S/Signed

TOM STAGG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

CIVIL ACTION NO. 78-0086

UNITED GAS PIPE LINE COMPANY

versus

ARVIS E. WHITMAN, SHERIFF AND
EX-OFFICIO TAX COLLECTOR,
BIENVILLE PARISH, LOUISIANA

MEMORANDUM RULING

Defendant has moved to dismiss this action for refund of state *ad valorem* taxes on the ground that the Court lacks jurisdiction over the subject matter. The Complaint alleges that the defendant parish tax collector has assessed and collected *ad valorem* taxes upon natural gas intended for interstate distribution, but stored within the parish, in violation of the United States Constitution as well as the Louisiana Constitution and statutes.

Defendant bases his Rule 12(b)(1) motion on the Tax Injunction Act of 1937 (28 U.S.C. §1341) which states:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Plaintiff does not contend that there is no adequate state remedy,[1] but rather that a refund action is not one to "enjoin, suspend or restrain" the tax collection. After reviewing the history of tax injunctions and the cases interpreting the 1937 Act, the Court must agree with plaintiff on the jurisdiction question. However, the doctrine of abstension requires a judgment of dismissal.

THE TAX INJUNCTION ACT OF 1937

The impetus for enactment of the Tax Injunction Act of 1937 was the Supreme Court's decision in *Ex Parte Young,* 28 S.Ct. 441 (U.S. 1908), which held that state officers performing unconstitutional acts could not claim Eleventh Amendment immunity from suit in federal court. In order to lessen the potential created by *Young* for federal judicial intervention in state government, the Court decided that federal courts should abstain from granting equitable relief against state taxes when the state provided an adequate remedy. *E.g., Matthews v. Rodgers,* 52 S.Ct. 217 (U.S. 1932). The Tax Injunction Act codified a portion of this doctrine of comity. *Garrett v. Bamford,* 538 F.2d 63, 66 (3d Cir.1976).

An action for a refund of taxes already paid is not a suit to "enjoin, suspend or restrain" the collection[2] of taxes in the literal sense. However, the Tax Injunction Act

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[1] Indeed, the Fifth Circuit has previously held Louisiana's statutory remedy adequate within the meaning of 28 U.S.C. §1341. *Bussie v. Long,* 383 F.2d 766, 770 (5th Cir.1967).

[2] Regardless of the state court's interpretation of "collection", *see Colonial Pipeline Co. v. Traigle,* 353 So.2d 728, 730 (La.App. 1st Cir.1977), a refund action has the same effect as a bar to collection because the contested tax is not available to the taxing authority. La.R.S. 47:2110(C).

generally is applied with as much attention to the policies it represents as to its literal terms. *E.g., Alnoa G. Corporation v. City of Houston,* 563 F.2d 769 (5th Cir.1977). Therefore, it is necessary to examine these policies.

It has been said that the 1937 Act evidences two Congressional concerns: First, that non-residents not be given something that is unavailable to residents of the forum state, namely the right to federal injunctive relief under diversity jurisdiction; Second, that the collection of state tax revenues not be delayed by federal court suits. *Tramel v. Schrader,* 505 F.2d 1310 (5th Cir.1975); *Hargrave v. McKinney,* 413 F.2d 320 (5th Cir.1969). As the Supreme Court noted in *Great Lakes Dredge & Dock Co. v. Huffman,* 63 S.Ct. 1070, 1074 (U.S. 1943), these two policies are, in reality, one:

> "The Act of August 21, 1937, was predicated upon the desirability of freeing from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid."

No policy underlying the 1937 Act would be advanced by barring federal jurisdiction over refund actions of the kind at bar. It is true that only non-residents of Louisiana have access to a federal forum for refund suits, but this does not result in their being able to withhold payment of the tax pending suit. Moreover, the state statute expressly provides for suits in federal court. La. R.S. 47:2110 (C).

The cases dealing with the application of §1341 to refund suits are not overly clear, even within the Fifth Circuit Court of Appeals. In *Bland v. McHann,* 463 F.2d 51 (5th Cir.1972), *cert. denied,* 410 U.S. 966 (1973), a case arising

out of Georgia, the Court appeared to find the bar of §1341 applicable to tax refund suits but relied primarily on notions of abstention. However, in a case not mentioned in *Bland, Mississippi River Fuel Corporation v. Cocreham,* 382 F.2d 929 (5th Cir. 1967), *cert. denied,* 390 U.S. 1014 (1968), the Court upheld jurisdiction over a Louisiana tax refund suit and stated that it had regularly done so in the past. 382 F.2d at 933. *See also Shell Oil Company v. Mouton,* 410 F.2d 715 (5th Cir.1969).

If §1341 is a jurisdictional bar to tax refund actions, these two decisions cannot be reconciled. In order for the Court to have properly dismissed one action but not the other, the question must be one of abstention rather than jurisdiction. *Bland* does not foreclose this result. In *Bland,* the taxpayer sought both an injunction and a refund, and crucial parts of the opinion suggest that the Court did not reach the applicability of §1341 to refund actions[3] because it found that abstention was required in any event. 463 F.2d at 26, 27. Furthermore, the Supreme Court recently stated in *dictum* that a refund calim "would not appear to implicate §1341." *Moe v. Confederated Salish and Kootenai Tribes,* 96 S.Ct. 1634, 1642 n.14 (1976). *See also Louisville & Nashville R.R. Co. v. Atkins,* 390 F.Supp. 576, 578 (M.D. Tenn.), *Aff'd* 96 S.Ct. 10 (U.S. 1975). But *see Kelly v. Springett,* 527 F.2d 1090, 1094 (9th Cir.1975).

Thus, although the Tax Injunction Act does not prevent this Court from exercising jurisdiction over the case at bar, the Court is sternly admonished to consider the propriety of abstention. *Askew v. Hargrave,* 91 S.Ct. 856

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[3] But see the *obiter dictum* in *United States v. State Tax Commission,* 505 F.2d 633, 638 (5th Cir.1974) ("It [§1341] also applies to suits for refunds.")

(U.S. 1971); *Hargrave v. McKinney,* 413 F.2d 320, 327 (5th Cir. 1969).

ABSTENTION

The first of the two doctrines of abstention relevant to the present suit is the doctrine, inherent in §1341, that federal courts should "avoid needless conflict with the administration by a state of its own affairs." Wright, Law of Federal Courts 199 (2d ed.1970). Any argument that this doctrine should apply to the present case is confronted with the fact that federal courts have often exercised jurisdiction over Louisiana tax refund actions. *E.g., Shell Oil Company v. Mouton,* 410 F.2d 715 (5th Cir.1969); *Mississippi River Fuel Corporation v. Cocreham,* 382 F.2d 929 (5th Cir.1967), *cert. denied,* 390 U.S. 1014 (1968) (and cases cited at 382 F.2d at 933 n.6). All of these actions were brought by mineral lessees of federally-owned property, however, and it is well-established that §1341 does not operate as a bar against suits by the United States "to protect itself and *its instrumentalities* from unconstitutional state exactions." *Department of Employment v. United States,* 87 S.Ct. 464, 467 (U.S. 1966) (emphasis added). Although this exemption, however expansively interpreted (*see Moe v. Confederated Salish and Kootenai Tribes,* 96 S.Ct. 1634, 1640-42 (U.S.1976), might not reach the mineral lessees in the above cases, the greater federal interest in such persons might account for the refusal to abstain. *See Shell Oil Company v. Mouton, supra,* 410 F.2d at 717.

The principles expounded in *Great Lakes Dredge & Dock Co. v. Hoffman,* 63 S.Ct. 1070 (U.S.1943), an action brought by a plaintiff of no special federal interest, leave no doubt that abstention is available here. In that declaratory judgment action, the Court found that "Interference with

state internal economy and administration is inseparable from assaults in federal courts on the validity of state taxation." *Id.* at 1073. Comity thus required abstention. In reaching this conclusion the Court examined Louisiana's statutory refund action (which remains essentially unchanged) and concluded that it afforded adequate protection to the plaintiff. *Id.* at 1072.

The effect of a refund action based on a claim of unconstitutionality is indistinguishable from the effect of a declaratory judgment. *see Kistner v. Milliken,* 432 F.Supp. 1001 (E.D. Mich.1977). Abstention thus would appear to be equally as appropriate here as it was in *Hoffman.* The adequacy of the state procedure is unquestioned and the courts of Louisiana are quite competent to dispose of federal constitutional questions. As the Supreme Court stated in *Hoffman, supra,* 63 S.Ct. at 1074:

> "***it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes."[4]

Louisiana R.S. 47:2110 does not change this analysis by referring to suit in federal court. There is no legislative history nor any clear intent, and the reference could easily be the result of a misunderstanding of the requirements of

[4] Review by the Supreme Court of such cases is made more easily obtainable by 28 U.S.C. §1257(2) which allows a losing plaintiff to proceed by appeal rather than *certiorari.*

federal law. *See Mississippi River Fuel Corporation v. Cocreham,* 382 F.2d 929, 934 (5th Cir.1967) (avoidance of the result in *Texas Co. v. Wilkinson,* 21 F.Supp. 771 [E.D. La. 1937]).

The doctrine of abstention discussed above applies whether the merits turn on questions of state or federal law. To the extent that the case at bar involves questions of state law, however, there is another doctrine which comes into play. "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions." *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 79 S.Ct. 455, 456 (U.S. 1959). *See Askew v. Hargrave,* 91 S.Ct. 856 (U.S. 1971). Although the first doctrine of abstention is the basis for this decision, the second doctrine would also lead the Court to abstain.

CONCLUSION

Given that the Court will abstain from exercising jurisdiction over this mater, the question becomes whether it is more appropriate to stay the proceedings but retain jurisdiction or to dismiss the action entirely. Because abstention is motivated by the desire to avoid interference with state government and because appeal to the Supreme Court adequately safeguards the plaintiff's federal rights, the latter route is the most appropriate.

Accordingly, the action is DISMISSED.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 11th day of April, 1978.

/S/Signed

TOM STAGG
UNITED STATES DISTRICT JUDGE